

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF TEXAS  
BEAUMONT DIVISION

JUAN REYES §  
VS. § CIVIL ACTION NO. 1:10CV82  
UNITED STATES DEPARTMENT OF §  
JUSTICE, ET AL §

MEMORANDUM ORDER OVERRULING OBJECTIONS AND  
ADOPTING THE MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

Plaintiff, Juan Reyes, currently an inmate confined at the Coleman Federal Correctional Institution in Coleman, Florida, proceeding *pro se*, filed this negligence tort claim pursuant to 28 U.S.C. § 1334(b) against the United States Department of Justice (“DOJ”), unnamed prison officials at the United States Penitentiary in Beaumont, Texas (“Beaumont USP”), Dr. E. Estefan Od with Beaumont USP, unnamed medical personnel at the University of Texas Medical Branch in Galveston, Texas (“UTMB”), and Dr. Au, Dr. J. Womble and Dr. P. Surapaneni, all with UTMB.

The court referred this matter to the Honorable Earl S. Hines, United States Magistrate Judge, at Beaumont, Texas, for consideration pursuant to applicable laws and orders of this court. The magistrate judge recommends Defendant Au’s motion to dismiss be granted as plaintiff has failed to exhaust his administrative remedies.

The court has received and considered the Report and Recommendation of United States Magistrate Judge filed pursuant to such order, along with the record, and pleadings. Plaintiff filed objections to the Report and Recommendation. This requires a *de novo* review of the objections in relation to the pleadings and applicable law. *See* FED. R. Civ. P. 72(b). After due consideration, the court is of the opinion that plaintiff’s objections are lacking in merit. As the magistrate judge correctly noted, plaintiff concedes he has not even attempted to exhaust his administrative remedies. Failure to completely exhaust administrative remedies *prior* to filing an

FTCA claim is a jurisdictional defect that cannot be cured by administrative exhaustion *after* suit is filed. *McNeil v. United States*, 508 U.S. 106, 112, 113 S.Ct. 1980, 1984, 124 L.Ed.2d 21 (1993). Waivers of sovereign immunity are to be strictly construed and the court's subject matter jurisdiction is conditioned on plaintiff's compliance with § 2675(a). See *Gregory v. Mitchell*, 634 F.2d 199, 203-04 (5<sup>th</sup> Cir. 1985); see also *Price v. Untied States*, 69 F.3d 46, 54 (5<sup>th</sup> Cir. 1995). Furthermore, equitable considerations are not warranted in this case, as plaintiff suggests, since the court has no jurisdiction to try this lawsuit prior to the exhaustion of his administrative remedies. See *Houston v. U.S. Postal Serv.*, 823 .F2d 896, 903 (5<sup>th</sup> Cir. 1987).

ORDER

Accordingly, plaintiff's objections are **OVERRULED**. The findings of fact and conclusions of law of the magistrate judge are correct, and the report of the magistrate judge is **ADOPTED**. A final judgment will be entered in this case in accordance with the magistrate judge's recommendations.

So **ORDERED** and **SIGNED** this 8 day of **March, 2011**.



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Ron Clark, United States District Judge